Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JERRY W. DAVIS,
Petitioner,

v.

SIEMENS MEDICAL SOLUTIONS USA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 25, 2008

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QUESTION PRESENTED

Whether the lower courts' failures to properly apply Kentucky's common law of fraud in granting the Defendant's renewed motion for judgment as a matter of law, and the lower courts' failure to properly apply Kentucky's wage and hour laws violated fundamental Constitutional principles of Federalism?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Jerry Wade Davis, an individual, and Siemens Medical Solutions USA, Inc., a non-governmental corporation.

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JURISDICTION

This Court has jurisdiction to review the May 28, 2008 *per curiam* opinion of the U.S. Court of Appeals for the Sixth Circuit panel and the August 27, 2008 en banc order of the U.S. Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

KRS § 337.385. Employer's liability -- Unpaid wages and liquidated damages.

> (1) Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less

any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. Provided, that if, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself or themselves.

(2) At the written request of any employee paid less than the amount to which he is entitled under the provisions of KRS 337.020 to 337.285, the executive director may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The executive director in case of suit shall have power to join various claimants against the same employer in one (1) action.

STATEMENT OF THE CASE

Plaintiff/Appellant, Jerry W. Davis ("Mr. Davis" or "Plaintiff"), was employed at Siemens Medical Solutions USA, Inc. ("Siemens" or "Defendant") for over a decade, from 1992 to 2003. In 2002 Mr. Davis was expressly, and in detail, promised commissions on national sales for Siemens, as the first holder of the newly created position of National Product Sales Executive.

In this new position Mr. Davis contributed substantially to an over ten million dollar increase in sales for the IM Division during the 2003 fiscal year, earning for himself promised guaranteed amounts, and nearly $1.77 million in commissions, which Siemens fraudulently, and in breach of its promises, chose not to pay.

On March 31, 2004, Mr. Davis filed his complaint against Siemens in the U.S. District Court for the Western District of Kentucky. Cross motions for summary judgment were filed on July 6, 2005. The trial court, at that time presided over by Chief Judge John G. Heyburn, II, was presented with evidence of the oral and written agreements and communications between Mr. Davis and Siemens, including a Compensation and Commission Plan ("Commission Plan"). The district court erroneously concluded that this generic commission plan was unambiguous, and interpreted specific language within the Commission Plan in a way that was expressly contradicted by other provisions of the same Commission Plan. (App. 29a) The district court erroneously denied Mr. Davis's dispositive motion on November 8, 2005, while incorrectly granting the Defendant's motion for

summary judgment on all of the Plaintiff's claims, except fraud, as to which it correctly denied Summary Judgment. (Id.)

On February 22, 2006, Magistrate Judge Moyer, who had taken over the case for trial because of Judge Heyburn's schedule, and pursuant to agreement of the parties, issued a written order, erroneously granting several of the Defendant's exclusion requests, but also refusing to exclude evidence relating to the mistreatment of Mr. Davis by Siemens' divisional Vice President, Thomas K. Riesenberg ("Mr. Riesenberg"), and evidence of Siemens' failures to pay other employees their earned commissions.[1] (App. 24a) After the opening statements were completed and testimony had begun, the trial court erroneously reversed itself in part, and, over Plaintiff's counsel's objections, also disallowed any evidence of Mr. Riesenberg's malicious treatment of the Plaintiff, and many of Mr. Davis's exhibits relevant to Siemens' continuing course of fraudulent and malicious, punitive-damages-worthy conduct. (App. 101a-102a)

The jury, after listening carefully for several days to live and transcript testimony, being extensively instructed by the court, and deliberating for hours, found unanimously in favor of Mr. Davis on his fraud

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[1] The trial court also erroneously granted several of the Defendant's motions, incorrectly holding in the same February 22, 2006 order that the following relevant evidence would be excluded: (1) evidence that Mr. Riesenberg similarly mistreated other Siemens' employees, (2) evidence that the Defendant failed to provide the Plaintiff with a promised company car, and, (3) evidence that the Defendant failed to pay Mr. Davis the entirety of his Guarantee Rider.

claim, and awarded him compensatory damages of $200,000.

Despite an unequivocal ruling by the district court against Siemens' Rule 50(B) motion during trial, Siemens filed a renewed motion for judgment as a matter of law following the unanimous jury verdict. App. 70a Notwithstanding the immediate availability during trial of daily transcripts (the cost of which were shared by the Plaintiff and Defendant), over a year later, with the impact of the witnesses' demeanor and testimony seriously faded, the trial court reversed itself once again, and granted Siemens' renewed motion, on March 6, 2007. (App. 8a) A panel of the Sixth Circuit rendered a *per curiam* opinion on May 28, 2008, affirming the decisions of the trial court. This opinion, in the main, simply adopted by reference the trial court's erroneous reasoning for its decisions.

On August 27, 2008 a Sixth Circuit panel issued an order denying Mr. Davis Petition for Rehearing En Banc. This Petition for Writ of Certiorari is now timely filed.

REASONS FOR GRANTING THE PETITION

A. IMPORTANT PRINCIPLES OF FEDERALISM DICTATE THAT THE FEDERAL COURTS MUST RESPECT AND ABIDE BY ESTABLISHED PRINCIPLES OF STATE LAW

When a federal court is sitting in diversity, principles of federalism dictate that the court respect the laws of the state courts and legislatures. "This separation of the two spheres is one of the Constitution's structural protections of liberty. 'Just

as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" Printz v. United States, 521 U.S. 898, 921 (1997) (quoting, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). See also United States v. Morrison, 529 U.S. 598, 655 (2000) (J. Breyer, dissenting in part) ("[n]o one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty -- both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home.").

In fact this principle has been recognized specifically by Federal case law repeatedly for seventy years now in the Erie Doctrine. That doctrine requires that the Federal courts respect the laws of the States in diversity cases. This Court in Erie recognized that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938).

Federal courts since Erie was decided continue to respect and adhere to the fundamental principles espoused in that case, namely that "[i]n diversity cases, the federal court must apply state law in accordance with the controlling decisions of the state's highest court." Salens v. Tubbs, 2008 U.S. App. LEXIS

19012, 7-8 (6th Cir. Mich. 2008) (citing, Eric R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938)).

However, in the present case, both lower courts have ignored the dictates of the Erie Doctrine, and the constitutional principles of Federalism anchoring it, by flouting the laws of Kentucky, as established by its legislature and its highest court. The lower courts violated these important principles when they denied Mr. Davis the chance to have his wage and hour claim heard by a jury, as required by KRS § 337.385. They also violated these fundamental principles when granting Siemens' renewed judgment as a matter of law, by failing to abide by the law established by the Kentucky Supreme Court, inter alia, in Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993), which unequivocally held that no contract language is strong enough to protect a party from its own fraud. For these reasons Mr. Davis respectfully requests that the Court grant this Petition for Writ of Certiorari and reaffirm the principles of Federalism that bind the federal courts.

1. The Court of Appeals' Panel Decision Regarding the Wage and Hour Claim and Contract Claim Was Contrary to Precedent and Violated Principles of Federalism.

The lower courts improperly applied Kentucky's wage and hour laws, KRS § 337.385, and denied Mr. Davis the opportunity to have his wage and hour claim heard by a jury. The lower courts' decisions with respect to Mr. Davis's wage and hour claim were contrary to established State precedent and violated the dictates of Federalism commanding that the laws

of the States be respected and followed in diversity cases.

In the fall of 2002, Mr. Davis was promised a first year base salary for the newly created National PSE position equal to $100,000 ($65,000 together with an additional (for one year) guaranteed income amount of $35,000), which total amount was promised by Siemens in a letter and Guarantee Rider sent by Siemens to Mr. Davis. (App. 135a, 138a) ("You will be paid a bi-weekly salary of $2,500," and "[t]he total of all Guarantee payments will total $35,000.00.") (App. 135a) That Siemens promised this base pay to Mr. Davis, including the Guarantee Rider amount, is undisputed by Siemens. (App. 138a)

Despite the undisputed promise by Siemens to pay this full $100,000 amount to Mr. Davis, Siemens underpaid Mr. Davis, as to this base income and rider, by at least $14,023.49. Mr. Davis was entitled to recover this unpaid guaranteed wage, plus an amount equal to the same in liquidated damages, interest, and incurred attorneys' fees, all under KRS 337.385.

In granting the Siemens' Motion for Summary Judgment on the issue of Mr. Davis's wage claim under KRS 337.385, the district court initially erroneously held that Mr. Davis's claim failed because he had not satisfied an administrative prerequisite. (App. 60a)

One day after briefing was concluded on the cross-motions for summary judgment, the controlling decision to the contrary was rendered by the Kentucky Supreme Court in Parts Depot, Inc. v. Beiswenger and Housing Authority of Middlesborough, 170 S.W.3d 354

(Ky. 2005). The Kentucky Supreme Court held that an individual is not required to bring his or her wage claim before the Labor Commissioner. To the contrary, that Court held that a case can be brought directly to civil court under this State statute, and that a trial court has original, subject matter jurisdiction over these types of claims. Id.

Mr. Davis moved to alter the district court's erroneous order pursuant to this Parts Depot case, and brought this controlling decision squarely to the district court's attention. (App. 64a) In the district court's holding on Mr. Davis's motion to modify, however, the district court erroneously advanced a new reason for dismissing the Plaintiff's entire wage claim and not allowing it to go forward. (App. 26a) The district court mistakenly concluded that the unrelated terms of the Commission Plan did not entitle Mr. Davis to the claimed commissions, bonuses, and guaranteed income. (Id.) The Commission Plan did not control or set forth the terms for the income guaranteed to Mr. Davis by Siemens in the employment letter and Guarantee Rider referenced above.

Furthermore, the district court's conclusion that the terms of the Commission Plan did not entitle Mr. Davis to commissions and bonuses was, in and of itself, erroneous, as explained more fully below. (In addition to his unpaid base pay, however, Mr. Davis also was entitled under the wage statute to the commission and bonus wages for which he was eligible under the Commission Plan.)

No part of Mr. Davis's Wage and Hour claim should have been subject to summary judgment. The motion

to alter the district court's incorrect opinion and decision denying all of these claims was improperly denied, contrary to the established statutory and case law of Kentucky.

When Mr. Davis appealed this incorrect holding to the Sixth Circuit Court of Appeals, the Defendant conceded in its briefing before the Sixth Circuit, and during the appellate oral argument, that Mr. Davis was owed the full $35,000 guarantee rider, a substantial part of which he still was not paid. Subsequently, the Sixth Circuit panel erroneously misstated in its opinion that, "[t]o the extent that Davis's statutory claim is based upon the failure of the defendant to pay the entire base salary promised in the company's guarantee rider, we are informed by counsel that the issue has been resolved out of court to the satisfaction of both parties." Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *5-6 (6th Cir. 2008). **To the contrary, counsel for Mr. Davis never informed the panel of any resolution or satisfaction of any claim.** (App. 142a-147a)

Siemen's exceedingly belated partial payment of the unpaid Guarantee Rider, after oral argument before the Sixth Circuit panel, did not properly compensate Mr. Davis for the time and expense he has invested to recover those funds; it did not include the permitted liquidated damages, the attorneys' fees, nor the statutory interest owed to him under KRS § 337.385.[2] "[S]ection 337.385 (1) 'unambiguously

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[2] Siemens' counsel himself has acknowledged in writing that this payment did not satisfy or resolve any claims: "These payments

authorizes an uncompensated or undercompensated employee to sue the employer in 'any court of competent jurisdiction' for the amount due and unpaid, plus liquidated damages, costs, and attorney fees.'" Oaks v. 3M Co., 453 F.3d 781, 783 (6th Cir. 2006) (citing Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005)).

The Sixth Circuit and the trial court also erroneously reasoned that Mr. Davis supposedly was not "personally and directly responsible," in some sense other than what was reasonably understood by Mr. Davis and other Siemens' employees in the actual business context of their work, for the sales from which commissions and bonuses would be paid under the terms of the Commission Plan. This extraneous definition for "personally and directly responsible" employed by the lower courts was cobbled together imprecisely by the district court from multiple, conflicting definitions in a dictionary,[3] rather than

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are being made unilaterally and unconditionally. Siemens is not requesting that Mr. Davis waive any claims that he may have against the Company in exchange for this payment." See Letter from Dana Rust, Siemens' counsel. (App. 142a-147a)

[3] At least one of the definitions partially quoted by the district court for the term "responsible" is entirely consistent with the definition of that term understood by Mr. Davis, i.e., that he was "responsible" as being "answerable or accountable" for sales in National and Government Accounts. (App. 38a-39a) The court erroneously mingled two *separate* dictionary definitions of the word "responsible," reciting both "answerable or accountable" and "chargeable with being the author, cause, or occasion of something" in its opinion. (Id.) The lower court's dictionary source, The Random House Unabridged Dictionary, 2nd Edition, pg. 1641 (1993), lists those two definitions of "responsible"

sensibly derived from the language and intention of the plan and the parties, as ascertained from the actual provisions of the compensation plan and the practices of the parties.

Being "personally and directly responsible" for a sale either means what Mr. Davis and many of his colleagues on the sales staff of Siemens actually, reasonably understood it to mean, and Siemens led and wanted Mr. Davis to believe it meant, or it was ambiguous, uncertain, and indefinite. The district court's patchwork, mis-applied dictionary definition contradicts the Defendant's own established policy of paying commissions to PSEs on all sales **within their territories**.

It has long been the rule in Kentucky courts that parol evidence should be admitted where a written contract by its terms is ambiguous, vague, indefinite or

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separately under two different, separately numbered definitions, 1 and 3, respectively. The district court also omitted entirely the following bolded dictionary language from its quotation: "1. answerable or accountable, **as for something within one's power, control, or management**." (Emphasis added.) The District Court went on to quote, in part only also, the definitions from Random House for the terms "directly" and "personally." "Directly" is defined as "1. in a direct line, way, or manner; straight." The term "personally" is defined as itself meaning "directly," or "3. as regards oneself" or "4. as an individual." The definitional exercise shakily embarked upon by the trial court, when carried out carefully and completely to a proper conclusion, actually accurately fits Mr. Davis's understanding of the phrase: that he needed only be in a "direct line, way, or manner," "individually" "answerable or accountable" for National and Government Accounts Sales (all of which he was) to be entitled to and receive commissions for those sales.

uncertain in its meaning. Westinghouse Electric & Mfg. Co. v. Greenville Coal Co., 183 S.W. 901, 902 (Ky. 1916). This established rule of Kentucky law also was ignored by the lower Federal courts.

2. The lower Federal courts also ignored the common law of Kentucky by granting and affirming Siemens' renewed motion for judgment as a matter of law, more than a year after an unanimous decision by the Jury in the Plaintiff's favor, thereby ignoring State law and violating principles of Federalism.

The lower courts ignored clear Kentucky case law when it granted the Defendant's renewed motion for judgment as a matter of law. In its opinion, the Sixth Circuit affirmed the district court's finding that even if Doug Spotts, the Siemens National Sales Manager, had made representations "concerning the payment of commissions . . . Davis could not have reasonably relied upon that promise, given the clear contract language to the contrary." Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *3-4 (6th Cir. 2008). This reasoning flies directly in the face of the common law of Kentucky, as established by the Kentucky Supreme Court in Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993). The court in Hanson held:

> The idea that any person or industry or enterprise would be immune from liability for fraud and deceit is not acceptable. . . The law should not, and does not permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable

> because of public policy. Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith.

Hanson, 865 S.W.2d at 309-310.

The Kentucky Supreme court in Hanson established that no contract language may exist in Kentucky strong enough to "protect a person from his own fraud." However, the lower Federal courts' reliance on the ambiguous written language of a boiler plate Commission Plan to make Mr. Davis's reliance on the fraudulent promises of Doug Spotts, the Siemens National Sales Manager, unreasonable as a matter of law, contradicts this established Kentucky Supreme Court common law. The lower Federal courts' reliance on the language in the Commission Plan to undercut Mr. Davis's reasonable reliance violates the Kentucky State law established in Hanson. As indicated, ignoring the law established by Kentucky's highest court runs afoul of the Erie Doctrine and the Constitutional principles of Federalism.

a. A reasonable jury could, and unanimously did, find that Mr. Davis reasonably relied upon Siemens' misrepresentations. Mr. Davis presented sufficient proof at trial on this material factual issue, which resolved it to the jury's satisfaction.

In overruling Siemens' motion for directed verdict, the trial court at that time stated clearly and compellingly its reasons for allowing Mr. Davis's

misrepresentation claim to proceed to the jury, as follows:

> THE COURT: All right. Thank you, Ms. Settle. Mr. Bishop, I'm going to rule on this now. I don't mean to cut you off, but I think that -- that -- ***I thought a great deal about this over the weekend. And I'm convinced this is a case that has to be decided by the Jury.*** I'm going to overrule the Rule 50 motion. I know it was thoughtfully prepared and well argued. But I think that, essentially, what Ms. Settle has argued is that it was, at worst, a misunderstanding, **taking a lot of inferences in ways that are most favorable to the defendant** and not favorable to the plaintiff. And I think it is ultimately up to the Jury to decide whether it was a misunderstanding or misrepresentation and if so, with what state of mind it was made. You know, there are some tough judgment calls here, but the Court is reluctant to substitute its view of the facts for the view of the facts that the Jury -- they are the judge of the facts. And **I acknowledge that there are some questions about what was said, what was the frame of mind, was there reliance, what is the impact of Mr. Davis' knowledge of the compensation plan, and there those are points for argument *with the Jury. The Jury may find them to be persuasive, but I don't think the Court wants to step in and take the case away from the Jury.*** I think that I've tried to listen as carefully as I can to the testimony, especially the testimony by Mr. Davis and Mr. Spotts, and I think there remains a factual

issue as to what was said, and what its impact was.

(App. 123a) (Emphasis added.)

There was a substantial amount of evidence in the trial testimony supporting the Jury's conclusion that Mr. Davis reasonably relied upon Mr. Spotts' representations that he would receive dual, override commissions on all sales made under national accounts. (App. 97a-99a) The district court undoubtedly and impermissibly ultimately reweighed the evidence already considered by the Jury when the court issued its order granting the Defendant's motion for judgment as a matter of law. "Courts are not free to reweigh the evidence. . . ." Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 821 (6th Cir. 2000).

In its opinion, the trial court has admitted this impermissible invasion of the jury's province, observing, as part of its memorandum opinion, that part of its analysis involved "weighing the evidence." (App. 14a-16a) The trial court again referred to the same impermissible inquiry when it stated that "the weight of the trial evidence [demonstrated] that his reliance was not reasonable." (App. 20a-21a) This weighing of the evidence by the court, a full year after it was weighed properly by the Jury, as was the Jury's function, not the court's, apparently misled the court into erroneously overturning the Jury's verdict.[4]

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[4] The trial court also erroneously challenged the law on Mr. Davis's misrepresentation claim which had been established correctly by Chief Judge Heyburn, who had the benefit of studying the parties' summary judgment motions and hearing oral argument on them when they were filed. Judge Heyburn

The trial court analyzed the unanimous jury verdict finding for Mr. Davis and somehow concluded that "there exists no testimony in the record that explicitly pertains to the reasonableness of Mr. Davis's reliance on Mr. Spotts' oral representations regarding his commission structure." (App. 20a-21a) The trial court ignored all of the testimony that supported the Jury's finding of reasonable reliance, even stating the court's newly mistaken belief that testimony on dual commissions was not duplicated by other witnesses, when it clearly was. (App. 91a-92a) Former Regional PSE Kurt Sieter testified (emphasis added):

> **Q. If a sale was made on product that was involving a hospital, as you described, or a hospital complex, as you described, that has its base where you are and has its -- and also has product being placed in California, would you get your commission on that product and the regional PSE in California get his commission on that product?**
>
> **A. Yes.** The original PSE in California would get whatever amount of that order was to be placed in their territory. In fact, there's a provision in the plan that talks about, you know, where it's being placed and what the provision is for the guy that sells it versus the

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determined that the Plaintiff's misrepresentation claim should be heard by a jury, allowing the claim to go forward after lengthy, and, for the Plaintiff, successful litigation, to a positive jury verdict. The trial court wrongly criticized this prior ruling allowing the misrepresentation claim to go forward, and took the unanimous Jury verdict away from Mr. Davis. (App. 18a-20a)

guy who has to, you know, install it and support it after the fact.

Former Regional PSE Bryan Poteet testified:

Q. Was it uncommon for Siemens to pay double commissions to its sales people in the IM division?

A. Define double commissions. I mean, if a transaction went down the way Siemens organized was, if the AE and the PSE would be paid on a deal, so they would pay a sales guy and they would pay what would be the product guy. So that's the structure of Siemens. So, if you're saying two individuals getting paid for the same transaction, the answer is, yes.

Q. And they were being paid on the same sales dollars?

A. Same sales dollars.

Q. What would you call that, a dual commission?

A. I mean, I don't know if it's called dual commission or not. The reality is, if a transaction went down, **both people received an amount of money for that transaction**. Their scale is different from our scale.

(App. 79a-80a) (Emphasis added.)

Similar testimony was elicited from Regional PSE Christie Whelan, via her deposition testimony, which was read into the record at trial:

> Q. And if there were sales dollars that were generated by an account executive in your area, you would receive commissions on those sales dollars as well; correct?
>
> A. For IM solutions, correct.
>
> Q. Right. The account executive would receive commissions and you would receive commissions.
>
> A. That's correct.
>
> ....
>
> **Q. Were there times when you were doing all of the work on an IM sale and an account executive got a commission on it?**
>
> **A. Yes.**

(App. 92a-93a) (Emphasis added.)

Comparable testimony was also read at trial from the deposition of former Regional PSE Winn Corder, who testified:

> **Q. Okay. Have you ever been paid a commission on a sale that you were not personally responsibly -- or personally and directly responsible for?**

A. Oh, yeah.

(App. 93a-94a) (Emphasis added.)

Testimony introduced at the trial of this matter established, many times over, that dual commissions were paid, and known to be paid, by Siemens to its employees. The trial court's failure to recollect all of this critical testimony may be a function of waiting over a year after the jury's verdict to rule on the Defendant's motion, by which time the court's recollection was just not as fresh or comprehensive as it had been at the time of the trial, and with the entire weekend to reflect on Siemens' anticipated motion for directed verdict. This testimony, coupled with the representations of Mr. Spotts', the National Sales Manager for Siemens, who had not previously lied to Mr. Davis, that he would receive commissions on all sales under national accounts, provided more than sufficient support for the Jury's conclusion that Mr. Davis's reliance was reasonable. (App. 97a-99a)

Mr. Davis's reliance also was reasonable, among other things, because he explicitly testified at trial that he had never before had problems with, or been lied to by, Mr. Spotts, the Siemens National Sales Manager, the top sales executive for the company, with obvious apparent authority and competence to make such promises. (App. 108a-110a) Mr. Davis reasonably relied on these promises of Mr. Spotts, not only because of Mr. Spotts' previous honesty with Mr. Davis, but because Mr. Davis knew of other commissions paid (e.g., as cited above, $500,000 for a *Regional* PSE, while Mr. Davis was the company's first *National* PSE). These promises were reasonable, given the difficulty and risk entailed in this brand

new, national-scope, critical job Mr. Davis was being asked to get up on the stage and accomplish:

> Q. I understand you don't expect there to be a cap, but at the same time, you probably have in your mind some sort of expectation about what you might get?
>
> A. I knew what other sales people were making, people that I had trained, people that had much smaller territory. So, yeah, I knew there was great potential there, yeah, there's no doubt about it.

(App. 110a-111a)

Mr. Davis also testified at trial that he would not have accepted this new position if he had thought he was going to have to *split* commissions with the Regional PSEs and local AEs, because he did not want to be in direct competition with long-time colleagues with whom he was supposed to be making a joint, complimentary effort on the national level, and because he was certain that that structure would undermine the company's GPO sales. (App. 98a-99a) This fact also demonstrated that Mr. Davis was reasonably relying on being paid in the manner in which he testified Mr. Spotts promised Mr. Davis he would be compensated - that is, commissions on all sales to national accounts in a dual, i.e., override manner, that would not reduce commissions to the regional PSE's or local AEs. (Id.)

Mr. Davis understandably, predictably, and reasonably relied upon his high-level manager, Doug Spotts. The fact that Mr. Spotts was the Siemens

National Sales Manager alone was sufficient to justify the Jury's finding of Mr. Davis's reasonable reliance on Mr. Spotts' word. (App. 108a-109a) Mr. Spotts, as the NSM, was well aware of the amount of sales which could be made under the IM Division's National and Government Accounts, and upon which sales he represented Mr. Davis would be earning commissions:

> Q. Now, do you think Mr. Spotts said whatever he said to you incidentally without intention of lying, but simply because it wasn't clear on how to pay you in performing this new job?
>
> A. **Doug Spotts was a *national sales manager*. He knew what the numbers were.** He gave me a job, gave me a compensation plan.

(App. 108a-109a) (Emphasis added.)

Furthermore, contrary to the district court's strained reasoning in its Memorandum Opinion on the Motion for Judgment as a Matter of Law, there is a very logical and reasonable basis for the jury's award of $200,000, rather than $1.77 million, and such an award does not discredit Mr. Davis's reasonable reliance on the representations that were made to him. In its jury instructions the trial court informed the Jury that "[t]his is not a case of breach of contract. Accordingly ***you are not being asked to decide whether Siemens Medical Solutions breached the terms of its written commission plan with Mr. Davis***." (App. 126a-127a) (Emphasis supplied.) Because the district court instructed the jury that the contract claim had been previously decided, it is

reasonable to assume that the jury, while concluding that Mr. Davis was reasonable in understanding that he would receive commissions under the plan, used a different measure of damages for Siemens' misrepresentation, i.e., for what lesser amount Mr. Davis (or they) still would have taken the job on. During cross-examination by counsel for Siemens, Mr. Davis testified that he would have taken the position of Product Sales Executive for less than $1.77 million. (App. 104a-106a) Siemens also brought on numerous Regional PSEs to testify to the amount of commissions they made during that fiscal year of 2003. Those amounts ranged between roughly $130,000 and $500,000. (App. 74a-76a, 82a-84a, 90a-92a) Based upon the testimony of Mr. Davis and these Regional PSEs, coupled with the trial court's explicit jury instructions to ignore the contract, it was neither inherently illogical nor unreasonable for the jury to have found $200,000 was an amount of compensatory damages they would award Mr. Davis on his isolated misrepresentation claim.

b. The Defendant Siemens has not met and cannot meet its burden of showing a complete absence of proof as to the elements of Mr. Davis's misrepresentation claim.

Mr. Davis provided proof to the jury of all elements of his claim of misrepresentation. The elements of such a claim are: "1) a material misrepresentation; 2) which is false; 3) known to be false or made recklessly; 4) made with inducement to be acted upon; and 5) acted in reliance thereon and causing injury." Denzik v. Denzik, 197 S.W.3d 108, 110 (Ky. 2006).

The proof provided by Mr. Davis was "developed by the character of the testimony, the coherency of the entire case, as well as the documents, circumstances, and facts presented." UPS v. Rickert, 996 S.W.2d 464,468 (Ky. 1999). The Defendant itself has not disputed that the representation was material or that Mr. Davis suffered injury. (App. 70a-72a)

Among other things, the elements of misrepresentation may be established by wholly circumstantial evidence. UPS v. Rickert, 996 S.W.2d 464,468 (Ky. 1999); Grant v. Wrona, 662 S.W.2d 227, 229 (Ky. App. 1983). Even if it were to be accepted as true that Mr. Davis could not offer direct evidence of the intent to deceive, Mr. Davis offered at trial a good deal of circumstantial evidence to prove that Mr. Spotts intended to deceive him. As established by Kentucky precedent, a finding of misrepresentation can rest entirely on such circumstantial evidence. Id.

Mr. Davis offered substantial evidence to the jury that a misrepresentation was made to him by Mr. Spotts, as fully outlined in the Statement of the Facts, supra, regarding the assignment of Mr. Davis to, and the opportunity for the receipt by him of dual commissions on, National and Government Account sales for the IM Division, with his nationwide territory. (App. 97a-99a) Mr. Davis reiterated under both direct and cross examination the false statements that were made to him by Siemens National Sales Manager:

> Q. Did Mr. Spotts say anything to you about what dollars you would be paid on and what relationship your commissions would have to

the other product, the regional product sales executives?

A. It would be paid on anything that was booked under national accounts. National accounts includes both Government and GPOs.

(App. 97a-98a)

Q. And did Mr. Spotts represent to you that these accounts would be – these national accounts would be subject to a commission paid to you on every dollar?

A. Yes.

(App. 98a-99a)

This testimony by Mr. Davis was falsely, and unconvincingly, contradicted by Mr. Spotts, who testified (but obviously without being believed by the jury who observed him testify) as follows:

Q. What would be his incentive? He was a salesman, correct?

A. Correct.

Q. And salesmen are incentivized by commissions at Siemens?

A. Correct. For the GPOs, his compensation was his base salary.

Q. And that's it. There is no commission incentive for him to do this work on the GPOs, according to your testimony?

A. That's correct.

(App. 118a-120a)

The Jury, properly using their reasonable minds, could and did believe the credibility and testimony of Wade Davis over that of Doug Spotts. The Jury found that Mr. Davis had been promised by Mr. Spotts, and was entitled to, commissions, after it listened to the frankly incredible testimony of Mr. Spotts.

Testimonial evidence was offered to the jury that the misrepresented assignment of responsibility for those accounts and that territory, and the promised commissions thereon, were material to Mr. Davis, as the following question put to Mr. Davis and his answer at trial confirmed:

Q. So, a 35,000 dollar raise wouldn't have been enough?

A. Not for that job, no.

(App. 98a-99a, 104a-105a)

Q. Maybe you would have been happy with $150,000?

> A. No, I would never be happy being told what a cap would be and that's not why you go into sales.

(App. 111a)

This testimony also constituted convincing evidence that Mr. Davis acted in reliance on these promises, taking on greater responsibility and risk with this new position, in exchange for the possibility of substantial commissions. This reliance was reasonable, as discussed in section 2, above.

Despite the above testimony, the lower courts ignored the holding in Hanson, and found that Mr. Davis's reliance upon Mr. Spotts promises was unreasonable as a matter of law. The lower courts' decisions have made reliance upon a promise unreasonable as a matter of law due to a writing, which is directly contrary to the precedent established by the Kentucky Supreme Court in Hanson. Cf. UPS v. Rickert, 996 S.W.2d 464, 471 (Ky. 1999).

Mr. Davis was not paid his promised commissions on National and Government Accounts, as both his pay statements and his testimony established for the jury:

> And basically just described that I can't get my name in the system to get paid because it's showing, you know, the local PSE. So, it wasn't a direct relation to the conversation I had, but it was -- the fact was still that if my name went in, I was going to bump the local sales guy and that was not what we agreed to.

(App. 99a-101a)

The falsity of Mr. Spotts' representations is also evidenced by his testified-to statements to the Siemens Product Sales Executives that their commissions would not be split with Mr. Davis, which assertion was openly contradicted by Mr. Spotts' deposition and trial testimony (which, furthermore, were even inconsistent with each other). The testimony of numerous other PSEs within Siemens was that, at a minimum, Mr. Spotts stated on a conference call that Mr. Davis's new position would not effect their commissions. (App. 75a-82a, 84a-90a, 92a-93a)

There certainly was not a complete absence of evidence upon which a reasonable jury could find that Siemens' NSM Spotts knowingly, or in reckless disregard of their falsity, made false statements to Mr. Davis about his assignment and commissions. As demonstrated above, the testimony of Mr. Davis and Mr. Spotts differed dramatically on the issue of what Mr. Davis was told regarding his assignment and commission opportunity. (App. 96a-98a)

Bryan Poteet, a regional PSE for Siemens at the time of Mr. Davis's tenure there, testified that, during a conference call, Mr. Spotts communicated to him and other PSEs that Mr. Davis's Commission Plan would not effect the ability of PSEs to earn their commissions:

> Q. Do you recall if during this telephone conference where Mr. Spotts had announced Mr. Davis's new role, do you recall if Mr. Davis's entitlement to earn commissions was discussed?
>
> A. It was basically – when it was announced that he would be in a sales role, you know, the

first question out of any sales guys mouth is how is that going to impact my commission? So, is that going to be – is that going to impact my commission? And the comment back was, it would not impact the local PSE's commission.

Q. Mr. Spotts told you that it would not impact – Wade Davis's commission would not impact –

A. That was communicated in the call. You have twelve sales people on the call, everyone of them want to know point number one, is it ever going to impede my dollar?

Q. Okay. Was it you understanding that Mr. Davis would be able to earn commissions of – as a result of this phone conference, that he would be able to earn commissions as a PSE for national accounts?

A. Yes.

(App. 79a)

Mr. Kurt Seiter, also a former PSE with Siemens, testified he was present on the same conference call, and that, in fact, Mr. Spotts stated Mr. Davis's commission structure would not effect the commissions of other PSEs:

A. Well, as sales people you can imagine that we're all very keen to have an understanding of how something like this might impact our own commission. ... If Wade is working on a project and dealing with a national account, does that somehow impact our own commission? Are we

> somehow going to have to give or will we be receiving less of a percentage on a deal because Wade would also be receiving a percentage on a deal. And the response to that was, you know, no.

(App. 87a-88a)

The jury witnessed Mr. Spotts' complete failure to answer straightforward questions regarding problems with Mr. Davis's change in title and pay structure as the new National PSE, and heard Mr. Spotts' self-serving reversal of his own deposition testimony on the latter point. (App. 111a-116a)

In fact Mr. Spotts contradicted testimony he had given only minutes earlier on the stand, regarding the existence of an Ultra Sound Group within Siemens. App. 123a-134a Mr. Spotts reversed his testimony before the Jury when faced with the hard, and still unanswered, question of why Mr. Davis was, unknown to him at the time, improperly placed in the Siemens' computer program as a PSE in the *Ultra Sound Group*. In that group, the testimony at trial confirmed, **Mr. Davis was prevented from receiving any commissions at all**. (App. 124a-134a)

Mr. Spotts certainly knew that Mr. Davis would not take the position without Mr. Spotts' promise of a dual commission on National Account sales. The Jury reasonably concluded that Mr. Spotts used the false promises to induce Mr. Davis to take on this demanding and critical position at a difficult time in the IM Division's history. (App. 98a-99a, 104a-105a)

The district court ignored clear Kentucky case law on the common law of fraud and the Sixth Circuit affirmed this error. The lower courts incorrectly reasoned that the ambiguous language of Mr. Davis's written stock Commission Plan made Mr. Davis's reliance on fraudulent promises from Doug Spotts, Siemens' National Sales Manager, unreasonable as a matter of law. This conclusion does not comport with the standard set forth by the Kentucky Supreme Court in Hanson, and violates the lower courts' responsibilities to properly apply the law of Kentucky in a diversity case.

CONCLUSION

For all of the above reasons, Mr. Davis respectfully requests that this Court grant this Petition for Writ of Certiorari and affirm the Constitutional principles of Federalism that bind the Federal courts.

Respectfully Submitted,

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